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No. 1176 58

In the Supreme Court of the United States

OCTOBER TERM, 1946

W. CLAY RODGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the district court. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 36–41) is reported at 158 F. 2d 835.

JURISDICTION

The judgment of the court below was entered on January 13, 1947 (R. 35). The petition for a writ of certiorari was filed March 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether interest on penalties, incurred as the result of marketing cotton in excess of farm marketing quotas, may be recovered for the period between the date such penalties became due and payable and the date judgment is entered.

2. Whether penalties, incurred by marketing cotton in excess of quotas then in effect, are recoverable after marketing quotas for subsequent years have been suspended or terminated.

STATUTE AND ADMINISTRATIVE REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. 1281 *et seq.*) and *of regulations issued thereunder* by the Secretary of Agriculture are set forth in the Appendix, *infra*, pp. 9–16.

STATEMENT

Farm marketing quotas for cotton were proclaimed by the Secretary in the manner required by the Act and were in effect in the marketing years 1940–41, 1941–42, and 1942–43. Farm acreage allotments were established for certain farms belonging to petitioner for the crop years 1940, 1941, and 1942, and upon the basis of such acreage allotments his farm marketing quotas were determined for the corresponding marketing years (1940–41, 1941–42, 1942–43). Petitioner planted cotton on each farm in excess of his acreage allotment, and marketed cotton in excess

of the established farm marketing quotas during each marketing year and while such quotas were in effect. Thereafter, because of a national emergency, the War Food Administrator[1] issued proclamations terminating marekting quotas for the 1943–44 marketing year and announcing also that quotas would not be in effect in the 1944–45 marketing year (R. 19–21).[2]

On August 10, 1945, the respondent brought this action to recover the marketing quota penalties incurred by petitioner during the marketing years 1940–41, 1941–42, and 1942–43, with interest thereon from the date such penalties became due and payable (R. 1–8). Petitioner's motion to dismiss on the grounds that the penalties sued for had been suspended by orders of the War Food Administrator was denied (R. 9, 15). The answer of petitioner denied liability on the ground that the penalties were not enforceable because of the suspension orders (R. 16–17), and the facts were stipulated (R. 18–22).

On March 4, 1946, the United States District Court for the Western District of Tennessee

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[1] The administration of the marketing quota provisions of the Act was transferred from the Secretary of Agriculture to the War Food Administration by Executive Orders 9322 and 9334 (8 F. R. 3807, 5423).

[2] Quotas have not been in effect for any marketing year since 1944–45 and on July 24, 1946, Congress provided that quotas should not be established for the 1947 crop because of a shortage of fats and oils and protein feeds (Public Law 544, 79th Cong., 2d Sess).

entered judgment against petitioner for penalties in the amount of $7,039.52, plus $1,682.46 interest (R. 22–24). The Circuit Court of Appeals affirmed the judgment (R. 35).

I

REASONS FOR NOT OPPOSING THE GRANT OF THE WRIT ON THE QUESTION OF INTEREST

One aspect of the holding of the court below is in conflict with *United States* v. *West Texas Cottonoil Co.*, 155 F. 2d 463 (C. C. A. 5) which, like the present case, involved an action to recover penalties for the marketing of cotton in excess of farm marketing quotas. In that case the court held that interest before judgment is not recoverable on penalties prescribed by the Act because the statute did not specifically so provide. Both courts permitted recovery of interest on the judgment and the present petitioner has limited his request for review of the interest issue to that recoverable before judgment (Pet. 3, 5).

The Government believes that the decision below allowing interest is in accordance with law because the so-called penalty is not a true penalty but a statutory obligation in the nature of a debt. In the *West Texas Cottonoil Co.* case the question of interest on the "penalty" obligation did not arise in the district court and it arose only incidentally on appeal. There the United States as appellant sought reversal of the district court's judgment denying recovery of penalties im-

posed upon the sale of excess cotton to the government of France. The question involving interest was not fully presented in written or oral argument[3] and the Circuit Court of Appeals, without discussion of the nature and purpose of the exaction, concluded that it was a penalty in the ordinary sense. On the other hand, in the instant case the question was squarely presented and the opinion of the court below reflects careful analysis of the purpose of the Act and the nature of the statutory obligation referred to as a penalty. Its decision that the statutory obligation is not a penalty in the ordinary sense is supported by the reasoning of the Circuit Court of Appeals for the Fourth Circuit in *Usher* v. *United States*, 146 F. 2d 369.

The conflicting rules in the Fifth and Sixth Circuits in regard to liability for interest before judgment make uniform enforcement of the Act impossible. The problem recurs frequently enough to make it highly desirable, from the standpoint of proper administration, that this Court resolve the existing conflict.[4] Therefore,

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[3] The question was presented by a petition for rehearing filed by the Government and denied by the Circuit Court of Appeals. *United States* v. *West Texas Cottonoil Co.*, 155 F. 2d 463.

[4] The Acting Solicitor General has been advised that enforcement proceedings of the type here involved are now pending or are in the process of institution against twenty-three producers. In three instances the claims for interest before judgment will probably be denied because of the present rule in the Fifth Circuit. In four instances the question

the Government does not oppose the granting of the writ on this question.

II.

REASONS FOR DENYING WRIT ON QUESTION OF RIGHT TO RECOVER PENALTIES

Petitioner contends (Pet. 12–17) that the penalties incurred during the marketing years in question are not collectible because of the action of the War Food Administrator in terminating marketing quotas for the marketing year 1943–44 in view of a national emergency. He asserts that such action suspended the Act and terminated its effectiveness, and invokes the common law rule that in the absence of a saving clause penalties and offenses prescribed by statute expire upon the repeal of the statute. The rule upon which petitioner relies has been abrogated by statute (1 U. S. C. 29; *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452) but if the rule were operative the circumstances here would not present a case for its application.

The Act authorizes the Secretary of Agriculture to establish marketing quotas for cotton on the basis of definite standards, which quotas shall be in effect during a specific marketing year. He is authorized to increase or terminate such quotas when he finds it necessary to do so in order (1) to make the amount of the commodity which is free of marketing restrictions equal to normal

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will arise in courts within the Sixth Circuit and they will presumably regard the case at bar as controlling.

supply, or (2) to meet a national emergency or increase in export demand (Act, Sec. 371; as amended; 7 U. S. C., Supp. V, 1371). During any years in which marketing quotas are not effective, the provisions of the Act lie dormant but the Act itself and all provisions thereof may be invoked by the Secretary whenever he determines the emergency is over and he finds that the supply of cotton exceeds the normal supply by more than seven per cent for such year. The Act has not expired by its own terms nor has it been suspended or repealed by Act of Congress. The statute, not the proclamation of the Secretary establishing quotas or the regulations implementing the Act, imposes the liability on the producer or buyer with respect to cotton marketed in excess of the producer's marketing quota (Act, Secs. 345, 348, as amended, 372; 7 U. S. C. 1345, 1348, 1330 (9); 1372).

This Court has considered the precise point presented here in two recent cases involving similar circumstances and has held that the suspension or termination of a regulation by an administrative body does not foreclose the right to invoke sanctions prescribed by statute for violations of the regulation occurring before its suspension or termination. *United States* v. *Hark*, 320 U. S. 531; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304. See also *Utah Junk Co.* v. *Porter*, 328 U. S. 39.

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In the instant case the Secretary terminated marketing quotas, previously proclaimed by him, pursuant to authority conferred by Congress. His action neither suspended nor terminated the Act; Congress alone had those powers. The decision of the Circuit Court of Appeals upon this point was correct and there is no substantial question for review. It is therefore urged that review of this question be denied.

CONCLUSION

For the reasons stated, the Government does not oppose the grant of a writ of certiorari to review the judgment of the court below upon the limited question of the right to recover interest upon marketing penalties prior to judgment, but it respectfully submits that the writ should be otherwise denied.

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APRIL 1947.

APPENDIX

The pertinent provisions of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended (7 U. S. C. 1281 et seq.), are as follows:

SEC. 345. *Marketing Quotas.* Whenever the Secretary determines that the total supply of cotton for any marketing year exceeds by more than 7 per centum the normal supply thereof for such marketing year, the Secretary shall proclaim such fact not later than November 15 of such marketing year (or, in case of the marketing year 1937–1938, within ten days after the date of enactment of this Act), and marketing quotas shall be in effect during the next succeeding marketing year with respect to the marketing of cotton. Cotton produced in the calendar year in which such marketing year begins shall be subject to the quotas in effect for such marketing year notwithstanding that it may be marketed prior to August 1. (7 U. S. C. 1345).

SEC. 348. *Penalties.* Any farmer who, while marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which such cotton was produced, shall be subject to the following penalties with respect to the excess so marketed: 2 cents per pound if marketed during the first marketing year when farm marketing quotas are in effect; and 3 cents per pound if marketed during any subsequent year, except that the penalty shall be 2 cents per pound if cotton of the crop subject to penalty in the first year is

marketed subject to penalty in any subsequent year. (7 U. S. C. 1348).

SEC. 371. (a) If at any time the Secretary has reason to believe that in the case of corn, wheat, cotton, rice, peanuts, or tobacco the operation of farm marketing quotas in effect will cause the amount of such commodity which is free of marketing restrictions to be less than the normal supply for the marketing year for the commodity then current, he shall cause an immediate investigation to be made with respect thereto. In the course of such investigation due notice and opportunity for hearing shall be given to interested persons. If upon the basis of such investigation the Secretary finds the existence of such fact, he shall proclaim the same forthwith. He shall also in such proclamation specify such increase in, or termination of, existing quotas as he finds, on the basis of such investigation, is necessary to make the amount of such commodity which is free of marketing restrictions equal the normal supply.

(b) If the Secretary has reason to believe that, because of a national emergency or because of a material increase in export demand, any national marketing quota for corn, wheat, cotton, rice, peanuts, or tobacco should be increased or terminated, he shall cause an immediate investigation to be made to determine whether the increase or termination is necessary in order to effectuate the declared policy of this Act or to meet such emergency or increase in export demand. If, on the basis of such investigation, the Secretary finds that such increase or termination is necessary, he shall immediately proclaim such finding (and if he finds an increase is neces-

sary, the amount of the increase found by him to be necessary) and thereupon such quota shall be increased, or shall terminate, as the case may be. (7 U. S. C., Supp. V, 1371).

SEC. 372. (a) The penalty with respect to the marketing, by sale, of wheat, cotton, or rice, if the sale is to any person within the United States, shall be collected by the buyer.

(b) All penalties provided for in Subtitle B shall be collected and paid in such manner, at such times, and under such conditions as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other person is liable for the collection of the penalty, such other person shall remit the penalty. The amount of such penalties shall be covered into the general fund of the Treasury of the United States. (7 U. S. C. 1372).

SEC. 375. (a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this title.

(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this title. (7 U. S. C., Supp. V, 1375).

The pertinent provisions of the Act of May 26, 1941, 55 Stat. 203, 205, are as follows:

Notwithstanding the provisions of the Agricultural Adjustment Act of 1938, as

amended (hereinafter referred to as the Act)—

* * * * *

(9) The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941–1942 marketing year) shall be at a rate equal to 50 per centum of the basic rate of the loan for cooperators for such marketing year under section 302 of the Act and this resolution. (7 U. S. C., Supp. V, 1330 (9)).

With respect to the collection and payment of penalties, the regulations of the Secretary are substantially identical for the crop years 1940–41, 1941–42, and 1942–43. The regulations for the crop year 1942–43 provide:

SEC. 722.440. *Payment and Collection of Penalties.* (a) *Time when penalties become due.* The penalty shall be due at the time the cotton is marketed by sale, barter, exchange, or gift *inter vivos.* Cotton shall be deemed to be sold when either title to or actual or constructive possession of the cotton is delivered by or on behalf of the producer or any part of the purchase price is paid. Cotton shall be deemed to have been marketed by barter or exchange when it is delivered to the transferee of the cotton by actual or constructive delivery or the transferer has received any part of the property, goods, or services for which the cotton is being bartered or exchanged. Cotton shall be deemed to have been marketed by gift *inter vivos* when there is an actual or constructive delivery of the cotton to the transferee during the lifetime of the producer. Cotton shall be deemed to have been mar-

keted in processed form when the producer, or some person on his behalf, converts cotton into an article of trade and thereby causes the cotton to lose its identity as seed cotton or lint cotton. An article of trade within the meaning of this provision is any article made in whole or in part from cotton for the purpose of marketing such article.

(b) *Persons liable for collection and payment of penalties.* The penalty in connection with the marketing of cotton by sale to any person within the United States shall be collected by the buyer at the time of sale. The penalty in connection with the marketing of cotton by sale to any person not within the United States or by barter or exchange or gift *inter vivos* shall be paid by the producer. In the case of a barter or exchange or gift *inter vivos*, the penalty may be collected by the person to whom such cotton is transferred, if the producer and the transferee of such cotton agree, as evidenced by the form Cotton 613 covering the transaction, that the penalty shall be collected by the transferee as in the case of the marketing of cotton by sale to any person within the United States. The penalty, if any, due in connection with the marketing of any cotton produced on any farm for which a white marketing card is issued shall not be collected by the buyer or transferee of such cotton but shall be paid by the producer. The penalty, if any, due upon cotton marketed in processed form within the meaning of paragraph (a) shall be paid by the producer or, if the producer and the buyer or transferee agree, the buyer or transferee of the article of

trade into which the cotton was converted may collect and remit the penalty.

(c) *Payment of a penalty prior to the marketing of cotton.* Any penalty which would be incurred by any producer upon the marketing of cotton may be paid prior to the time such cotton is marketed, and the treasurer of the county committee for the county in which such cotton was produced shall receive the penalty as in the case of other penalties.

(d) *Manner of collection.* The penalty may be collected by the buyer by receiving the amount thereof from the producer or by deducting from the purchase price of the cotton the amount of the penalty due with respect to the marketing thereof. The penalty may be collected by the transferee by receiving the amount thereof from the producer.

(e) *Issuance of receipts for penalties collected.* Any buyer or transferee of cotton who, as provided for in paragraph (b), collects the penalty with respect to the marketing of cotton shall issue a receipt to the producer from whom the penalty is collected. (7 F. R. 4369; 1940–41 marketing year, Sec. 722.243, 5 F. R. 1894; 1941-42 marketing year, Sec. 722.343, 6 F. R. 972).

SEC. 722.441. *Remittance of Penalties to the Treasurer of the County Committee.* (a) *Time of remittance.* The penalty shall be remitted not later than 15 calendar days next succeeding the day on which the cotton was marketed by the producer. For and on behalf of the Secretary of Agriculture, the treasurer of the county committee for the county in which the farm on which the cotton was produced is located, or the treasurer of the county committee to whom the

report in connection with cotton marketed without the use of the means of identification prescribed by these regulations is made, shall receive the penalty and issue to the person remitting the penalty a receipt therefor on form Cotton 419 or form Cotton 419–A.

(b) *Form of remittance.* The penalty shall be remitted only in legal tender or by draft, check, or money order drawn payable to the order of the Treasurer of the United States. All checks, drafts, or money orders tendered in payment of the penalty shall be received by the treasurer of the county committee subject to collection and payment at par, and any receipt issued in connection therewith as provided for in paragraph (a) shall bear a notation to that effect and a description of the check, draft, or money order. (7 F. R. 4369; 1940–41 marketing year, Sec. 722.244, 5 F. R. 1894; 1941–42 marketing year, Sec. 722.344, 6 F. R. 972.)

SEC. 722.453. (c) *Payment of penalty.* The penalty shall be due at the time cotton is marketed in excess of the farm or producer marketing quota and shall be remitted to the treasurer of the county committee, as otherwise provided in these regulations, at the time the farm operator's report on form Cotton 417 for the farm is required to be submitted, as provided in Sec. 722.450 (d), and no extension or qualification of the time for paying the penalty shall be made or allowed by an officer or employee of the United States Department of Agriculture, member of a county committee, other local committee, or State committee, county agent, or officer or employee of such committee or of the county

agent's office. If funds are held in escrow to secure payment of the penalty, the penalty shall be paid by the use of such funds. Any part of the funds held in escrow in excess of the penalty incurred during the marketing year shall be returned to the person depositing them, in accordance with Sec. 722.442. In the event the principal sum of the bond or the amount of funds deposited in escrow is not sufficient to cover the amount of penalties incurred in respect to the farm, the owner or operator of the farm who gave the bond or deposited the funds in escrow shall be liable for and shall pay a sufficient additional amount to cover the amount of such penalties. Nothing contained in this paragraph shall discharge the other producers on the farm from liability to pay the penalties incurred by them. (7 F. R. 4374; 1940–41 marketing year, Sec. 722.256 (e), 5 F. R. 1900; 1941–42 marketing year, Sec. 722.356 (e), 6 F. R. 978).

U. S. GOVERNMENT PRINTING OFFICE: 1947